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In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. 1531 (Supp. III 2003)), prohibits a physician from knowingly performing a "partial-birth abortion" (as defined in the statute) in or affecting interstate commerce. Act § 3, 117 Stat. 1206-1207. The Act contains an exception for cases in which the abortion is necessary to preserve the life of the mother, but no corresponding exception for the health of the mother. Congress, however, made extensive factual findings, including a finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." § 2(14)(O), 117 Stat. 1206. The question presented is as follows:

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

PARTIES TO THE PROCEEDING

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondents are Leroy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument:
The Partial-Birth Abortion Ban Act of 2003 is constitutional on its face 12
I. The absence of a health exception does not render the Act facially invalid 13
A. A statute that regulates abortion, but lacks a health exception, is not facially invalid unless it would create significant health risks, and thereby impose an undue burden, in a large fraction of its applications 14
B. When analyzed under the proper standard, the record overwhelmingly supports Congress's judgment that no health exception was required 20
1. Congressional findings on constitutionally relevant factual issues are entitled to great deference 21
2. Congress's findings on the medical necessity of partial-birth abortion are entitled to deference 24

Table of Contents—Continued: Page

3. Congress's findings on the medical necessity of partial-birth abortion are supported by substantial evidence 30
C. Even assuming that partial-birth abortion has marginal health advantages in some cases, a statute that prohibits partial-birth abortion does not impose an undue burden on a woman's access to an abortion 40
D. To the extent that the Court believes that *Stenberg* compels a different result, it should be overruled 43
II. The Act is neither unconstitutionally overbroad nor unconstitutionally vague 44
A. The Act is not unconstitutionally overbroad 45
B. The Act is not unconstitutionally vague 48
III. Because the Act is constitutional, the Court need not fashion any remedy 49
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

A Woman's Choice—East Side Women's Clinic v. *Newman*, 305 F.3d 684 (7th Cir. 2002), cert. denied, 537 U.S. 1192 (2003) 28, 29

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 26

Ayotte v. *Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006) 8, 12, 14, 50

Board of Educ. v. *Mergens*, 496 U.S. 226 (1990) ... 22, 25

Carhart v. *Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998), aff'd, 192 F.3d 1142 (8th Cir. 1999) 29

City of Houston v. *Hill*, 482 U.S. 451 (1987) 46

Connecticut v. *Menillo*, 423 U.S. 9 (1975) 20

Dickerson v. *United States*, 530 U.S. 428 (2000) 27

Gooding v. *Wilson*, 405 U.S. 518 (1972) 46

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 48

Hill v. *Colorado*, 530 U.S. 703 (2000) 48

H.L. v. *Matheson*, 450 U.S. 398 (1981) 20

Jones v. *United States*, 463 U.S. 354 (1983) 22, 25

Kansas v. *Hendricks*, 521 U.S. 346 (1997) 25

Kolender v. *Lawson*, 461 U.S. 352 (1983) 48

Lambert v. *Yellowley*, 272 U.S. 581 (1926) 23, 25

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 25

Marshall v. *United States*, 414 U.S. 417 (1974) 23

National Abortion Fed'n v. *Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) 39, 40

Cases—Continued: Page

National Abortion Fed'n v. *Gonzales*, 437 F.3d 278 (2d Cir. 2006) 8, 9, 44
National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) 28
New York v. *Ferber*, 457 U.S. 747 (1982) 20
Ohio v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) 20
Planned Parenthood Fed'n of Am., Inc. v. *Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004) 40
Planned Parenthood Fed'n of Am., Inc. v. *Gonzales*, 435 F.3d 1163 (9th Cir. 2006) 8, 47, 49
Planned Parenthood of S.E. Pa. v. *Casey*, 505 U.S. 833 (1992) 10, 12, 15, 18, 19, 41
Roe v. *Wade*, 410 U.S. 113 (1973) 12, 14
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 22, 25, 27, 31
Sable Communications, Inc. v. *FCC*, 492 U.S. 115 (1989) 25, 26
Simopoulos v. *Virginia*, 462 U.S. 506 (1983) 20
Stenberg v. *Carhart*, 530 U.S. 914 (2000) ..... *passim*
Tucson Woman's Clinic v. *Eden*, 379 F.3d 531 (9th Cir. 2004) 25
Turner Broad. Sys., Inc. v. *FCC*:
512 U.S. 622 (1994) 21, 26
520 U.S. 180 (1997) ..... *passim*
United States v. *Morrison*, 529 U.S. 598 (2000) 27
United States v. *O'Brien*, 391 U.S. 367 (1968) 25

Cases—Continued: Page

United States v. *Oakland Cannabis Buyers Coop.*, 532 U.S. 483 (2001) 23
United States v. *Salerno*, 481 U.S. 739 (1987) ... 6, 16, 19
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) 46
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 23
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 22, 25

Constitution and statutes:

U.S. Const.:
Amend. I 20
Establishment Clause 22, 25
Amend. V (Due Process Clause) 25
Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 ..... *passim*
§ 2, 117 Stat. 1201-1206 ..... 4, 1a
§ 2(1):
117 Stat. 1201 ..... 2, 1a
117 Stat. 1203 23
§ 2(3)-(8), 117 Stat. 1201-1202 ..... 27, 2a, 3a, 4a
§ 2(5), 117 Stat. 1202 ..... 29, 2a
§ 2(14):
117 Stat. 1204 ..... 4, 5a
117 Stat. 1204-1206 26
§ 2(14)(A), 117 Stat. 1204 ..... 4, 6a
§ 2(14)(B), 117 Stat. 1204 ..... 4, 7a
§ 2(14)(C), 117 Stat. 1204 ..... 34, 7a

Statutes—Continued: Page

§ 2(14)(E), 117 Stat. 1204-1205 ..... 4, 7a
§ 2(14)(G), 117 Stat. 1205 ..... 11, 13, 8a
§ 2(14)(J), 117 Stat. 1205 ..... 42, 9a
§ 2(14)(L), 117 Stat. 1206 ..... 3, 11, 42, 9a
§ 2(14)(M), 117 Stat. 1206 ..... 2, 9a, 10a
§ 2(14)(N), 117 Stat. 1206 ..... 42, 10a
§ 2(14)(O), 117 Stat. 1206 ..... 3, 5, 30, 42, 10a
§ 3, 117 Stat. 1206-1207 ..... 10a, 11a
18 U.S.C. 1531 (Supp. III 2003) ... 5, 46, 47, 48, 49
18 U.S.C. 1531(a) (Supp. III 2003) 5, 4, 9
18 U.S.C. 1531(b)(1) (Supp. III 2003) 5, 46, 47, 48
18 U.S.C. 1117 49
18 U.S.C. 1201(c) 49
18 U.S.C. 2101(a) 49
Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999) 45

Miscellaneous:

143 Cong. Rec. 8355 (1997) 43
149 Cong. Rec.:
p. S2523 (daily ed. Feb. 14, 2003) 4
p. S3607 (daily ed. Mar. 12, 2003) 42
p. H4940 (daily ed. June 4, 2003) 42
H.R. Rep. No. 58, 108th Cong., 1st Sess. (2003) 42
Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 1st Sess. (2003) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 413 F.3d 791. The memorandum opinion and order of the district court (Pet. App. 26a-588a) are reported at 331 F. Supp. 2d 805.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2005. The petition for a writ of certiorari was filed on September 23, 2005, and was granted on February 21, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (18 U.S.C. 1531 (Supp. III 2003)), is set forth in an appendix to this brief.

STATEMENT

This case concerns the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003. That Act prohibits a physician from knowingly performing a partial-birth abortion—a particular abortion procedure that Congress found to be "gruesome and inhumane" and to "blur[] the line between abortion and infanticide in the killing of a partially-born child just inches from birth." Act §§ 2(1), 2(14)(O), 117 Stat. 1201, 1206. Congress passed the Act after conducting nine years of hearings and debates, after carefully considering this Court's precedents, and after making extensive findings based on the substantial testimony that it had received. Because Congress found, *inter alia*, that partial-birth abortion is "never medically indicated to preserve the health of the mother," § 2(14)(O), 117 Stat. 1206, it did not adopt a statutory exception for cases in which the abortion is necessary to preserve the mother's health. The court of appeals held that, under this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), the statute was facially invalid because it lacked a health exception, and permanently enjoined the Act's enforcement. That decision should be reversed by this Court.

1. The phrase "partial-birth abortion" refers to a particularly gruesome, late-term abortion procedure known as dilation and extraction (D&X) or intact dilation and evacuation (intact D&E). In that procedure, a physician partially delivers the fetus intact and then intentionally kills it, typically by puncturing its skull and vacuuming out its brain. See, *e.g.*, Resp. C.A. App. 116-117 (describing D&X procedure). "The vast majority of babies killed during [such] partial-birth abortions are alive until the end of the procedure" and "will fully experience the pain associated with piercing his or her skull and sucking out his or her brain." Act § 2(14)(M), 117 Stat. 1206; see, *e.g.*, Pet. C.A. App. 1554-1555; Resp. C.A. App. 287.

The D&X procedure differs from a more frequently used late-term abortion procedure known as standard dilation and evacuation (D&E), in which the physician typically dismembers the fetus while most of the fetus is still inside the womb. *Stenberg*, 530 U.S. at 914-915, 924-928; *id.* at 958-960 (Kennedy, J., joined by Rehnquist, C.J., dissenting). A consensus exists that "D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society." *Id.* at 963 (Kennedy, J., dissenting). Indeed, Congress has found that "[the] disturbing similarity [of partial-birth abortion] to the killing of a newborn infant promotes a complete disregard for infant human life," and that partial-birth abortion "blurs the line between abortion and infanticide." §§ 2(14)(L), 2(14)(O), 117 Stat. 1206.

2. Congress, like the majority of the States, has enacted legislation banning partial-birth abortions. It first began considering proposals to prohibit partial-birth abortion in 1995. In the following years, Congress held numerous hearings and received expert testimony that partial-birth abortions were not necessary to preserve the health of the mother in any circumstances; claims that partial-birth abortions were safer than standard D&E abortions were either incorrect or speculative; and, indeed, partial-birth abortions posed safety risks that D&E abortions did not. In 1996 and 1997, Congress passed bills that would have prohibited partial-birth abortion, but the President vetoed them. In addition, between 1992 and 2000, some 30 States enacted prohibitions on partial-birth abortion of their own. Pet. App. 2a; Gov't C.A. Br. 34-41.

3. In 2000, this Court invalidated a Nebraska statute that banned "partial birth abortion" (as defined in that statute) unless the procedure was necessary to preserve the life of the mother. *Stenberg* v. *Carhart*, *supra*. The Court held that the Nebraska statute was invalid for two independent reasons. First, the Court held that the statute was facially invalid be-

cause it lacked an exception for cases implicating the health of the mother. *Id.* at 930-938. Second, the Court held that the statute was invalid because it defined "partial birth abortion" in such a way as to reach not only D&X abortions, but also standard D&E abortions, and thereby imposed an "undue burden" on a woman's access to an abortion. *Id.* at 938-946.

4. In 2003, after more hearings and debate and by wide margins in both Houses, Congress passed, and the President signed, the Partial-Birth Abortion Ban Act of 2003 (the Act). The Act was predicated on numerous findings concerning the nature of partial-birth abortions and was expressly designed to avoid the deficiencies identified by this Court in the Nebraska statute at issue in *Stenberg*. See Act § 2, 117 Stat. 1201-1206; 149 Cong. Rec. S2523 (daily ed. Feb. 14, 2003) (statement of Sen. Santorum); *Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 37-38 (2003) (statement of Rep. Chabot).

First, based on "the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses," Act § 2(14), 117 Stat. 1204, the Act contains detailed factual findings with respect to the medical necessity of partial-birth abortion. Congress found, *inter alia*, that "[p]artial-birth abortion poses serious risks to the health of a woman undergoing the procedure," § 2(14)(A), 117 Stat. 1204; that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures," § 2(14)(B), 117 Stat. 1204; and that "[t]he physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome," § 2(14)(E), 117 Stat. 1204-1205. Based on those and other findings, Congress ultimately found that "partial-birth abortion is never medically indicated to pre-

serve the health of the mother." § 2(14)(O), 117 Stat. 1206. In the Act's operative provisions, therefore, Congress did not include an express statutory exception for cases in which the abortion is necessary to preserve the mother's health. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)).

Second, the Act contains the following, more specific definition of "partial-birth abortion":

> an abortion in which the person performing the abortion—(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). That definition is tailored to exclude the more common standard D&E abortion procedure that this Court found was reached by the Nebraska statute invalidated in *Stenberg*. The Act imposes criminal and civil sanctions only on a physician who "knowingly" performs a partial-birth abortion. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)).

5. Respondents, four physicians who perform late-term abortions, brought suit against the Attorney General, seeking a permanent injunction against enforcement of the Act. After a bench trial, the district court granted judgment to respondents, Pet. App. 26a-588a, and enjoined the Attorney General from enforcing the Act against respondents "in all of its applications when the fetus is not viable or when there is a doubt about the viability of the fetus in the appropriate medical judgment of the doctor performing the abortion." *Id.* at 545a.

The district court first held that the Act was invalid because it lacked a health exception. Pet. App. 451a-507a. The court refused to defer to Congress's findings, including its ultimate finding that partial-birth abortion was never medically indicated to preserve the health of the mother. *Id.* at 461a. The court recognized that, under *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), Congress's findings were entitled to "binding deference" as long as the findings were reasonable and supported by substantial evidence. Pet. App. 458a. However, the court stated that, in its view, the "case-deciding question" was whether "there [was] substantial evidence * * * from which a reasonable person could conclude that there is *no substantial medical authority* supporting the proposition that banning 'partial-birth abortions' could endanger women's health." *Id.* at 460a-461a. Under that standard, the court concluded, Congress's findings were not entitled to deference. *Id.* at 463a.

The district court also held that the Act was invalid because it reached certain standard D&E abortions, as well as D&X abortions. Pet. App. 507a-521a. The court, however, ultimately rejected respondents' contention that the Act was unconstitutionally vague. *Id.* at 522a-529a.

6. The court of appeals affirmed, holding that the Act was facially invalid because it lacked a health exception. Pet. App. 1a-25a. The court first determined that the appropriate standard for reviewing respondents' facial challenge was not the "no set of circumstances" standard articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), but rather "the test from *Stenberg*." Pet. App. 6a. The court then reasoned that *Stenberg* required a health exception when "'substantial medical authority' supports the medical necessity of [the regulated] procedure in some instances." *Id.* at 10a. "In effect," the court continued, "we believe when a lack of consensus exists in the medical community, the Constitution requires

legislatures to err on the side of protecting women's health by including a health exception." *Ibid.*

The court of appeals, like the district court, refused to defer to Congress's factual findings concerning the medical necessity of partial-birth abortion. Pet. App. 12a-16a. Unlike the district court, however, the court of appeals ultimately concluded that "the government's argument regarding *Turner* deference is irrelevant to the case at hand." *Id.* at 15a. The court explained that, while "[w]hether a partial-birth abortion is medically necessary in a given instance would be a question of fact," "whether the record in a particular lawsuit reflects the existence of 'substantial medical authority' supporting the medical necessity of such procedures is a question that is different in kind." *Id.* at 12a-13a. The court reasoned that "*Stenberg* created a standard in which the ultimate factual conclusion is irrelevant," *id.* at 13a, and concluded that, "[u]nder the 'substantial medical authority' standard, our review of the record is effectively limited to determining whether substantial evidence exists to support the medical necessity of partial-birth abortions without regard to the factual conclusions drawn from the record by the lower court (or, in this case, Congress)." *Ibid.*

The court of appeals then asserted that the medical necessity of a particular abortion procedure was a question of "legislative" fact. Pet. App. 16a-20a. The court observed that, in *Stenberg*, this Court had determined that "substantial medical authority" supported the need for a health exception in a statute regulating partial-birth abortion. *Id.* at 18a. The court asserted that "[n]either we, nor Congress, are free to disagree with the Supreme Court's determination because the Court's conclusions are final on matters of constitutional law." *Ibid.* Although the court conceded that *Stenberg* did not stand for the proposition that "legislatures are forever constitutionally barred from enacting partial-birth abortion bans," it asserted

that legislatures could enact such bans only if, "at some point (either through an advance in knowledge or the development of new techniques, for example), the procedures prohibited by the Act will be rendered obsolete." *Id.* at 19a-20a. While the court recognized that "[t]here is some evidence in the present record indicating each of the advantages discussed in *Stenberg* are incorrect and the banned procedures are never medically necessary," it held that the government had failed to "demonstrate that relevant evidentiary circumstances (such as the presence of a newfound medical consensus or medical studies) have in fact changed over time." *Id.* at 22a.

7. Since the court of appeals' decision, two other courts of appeals have passed on the constitutionality of the Act.

a. The Ninth Circuit held that the Act was facially invalid because it lacked a health exception, covered certain D&E abortions, and was unconstitutionally vague. See *Planned Parenthood Fed'n of Am., Inc.* v. *Gonzales*, 435 F.3d 1163, 1172-1184 (2006), pet. for cert. filed (No. 05-1382). Based on that holding, the Ninth Circuit concluded that it could not craft a narrower injunction under the approach outlined in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), and therefore permanently enjoined enforcement of the Act in its entirety. 435 F.3d at 1184-1191.

b. A divided Second Circuit panel held that the Act was facially invalid because it lacked a health exception. *National Abortion Fed'n* v. *Gonzales*, 437 F.3d 278 (2006). Chief Judge Walker concurred. He stated that it was his "duty to follow [this Court's] precedent in *Stenberg*," but that in his view *Stenberg* was "flawed" in "at least three respects." *Id.* at 290-291. First, *Stenberg* "equates the denial of a potential health benefit (in the eyes of some doctors) with the imposition of a health risk and, in the process, promotes marginal safety above all other values." *Id.* at 291. Second, *Stenberg* "endorses a rule that permits the lower courts to hold a statute

facially invalid upon a speculative showing of harm." *Ibid.* Third, *Stenberg* "establishes an evidentiary standard that all but removes the legislature from the field of abortion policy." *Ibid.* Judge Straub dissented. He explained that *Stenberg* is distinguishable in important respects and concluded that the "fundamental error" with the majority's approach was "to collapse the inquiry into whether a 'division of medical opinion' exists and thereby discard any role for congressional findings about the actual necessity of the procedure." *Id.* at 297.

SUMMARY OF ARGUMENT

The court of appeals erred in invalidating the Partial-Birth Abortion Ban Act of 2003. Congress's decision to ban the particularly gruesome partial-birth abortion procedure advances vital state interests and does not impose an "undue burden" on a woman's access to an abortion. Indeed, far from placing a substantial obstacle in the path of any woman seeking an abortion, the Act simply eliminates a disfavored and rarely used late-term abortion procedure that, as Congress found, is medically unnecessary. No precedent of this Court requires the judicial invalidation of that legislative measure.

I. The absence of a health exception to the Act's ban on a particular procedure does not impose an undue burden. Under this Court's precedents, the relevant inquiry in this context is whether a statute regulating an abortion procedure would create significant health risks, such that it would place a substantial obstacle in the path of a woman seeking an abortion, in a large fraction of its applications. The court of appeals erred by reading *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), as holding that the relevant inquiry was instead whether there is merely a *division of medical opinion* on whether the statute would create substantial health risks. Such a reading would delegate the authority over constitutional decisionmaking to a minority of medical professionals

and put *Stenberg* into conflict with this Court's earlier decisions, including *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), which require a plaintiff to do more than merely demonstrate the existence of conflicting opinions about health risks in order to negate the government's compelling interests in proscribing or limiting an abortion procedure. There is no reason for this Court to construe *Stenberg* in a manner that would *sub silentio* override its prior precedents.

Viewed in the proper light, the Act readily passes muster. In the Act, Congress made numerous factual findings, culminating in the ultimate finding that partial-birth abortion is *never* medically indicated to preserve the health of the mother. Those findings are supported by substantial evidence and entitled to deference under the long-standing principle that Congress is better equipped than courts to make factual findings that inform the constitutionality of federal statutes, including findings about complex medical judgments. There is no justification to disregard that principle here, where Congress has made express statutory findings on an issue of medical judgment based on testimony and other evidence received in extensive legislative hearings. This Court's decision in *Stenberg* focused on the trial record and the district court's factual findings concerning the medical necessity of partial-birth abortion. It did not purport to foreclose Congress from subsequently making findings on the same issue, based on a more recent, and more complete, evidentiary record.

Even if the Court were to decline to defer to Congress's findings concerning the absence of any significant health risks, the evidence presented by respondents at trial at most suggests that partial-birth abortion may be *marginally* safer than more common abortion procedures in some narrow circumstances. Given the critical state interests in proscribing that procedure, that cannot be sufficient to demonstrate that

a statute prohibiting partial-birth abortion imposes an undue burden on a woman's access to an abortion. The Act directly advances not only the government's compelling interest in protecting potential life, but also its specific, and equally compelling, interest in prohibiting a particular type of abortion procedure that bears a "disturbing similarity to the killing of a newborn infant." Act § 2(14)(L), 117 Stat. 1206. Indeed, one of the express purposes of the Act is to "draw a bright line that clearly distinguishes abortion and infanticide." Act § 2(14)(G), 117 Stat. 1205. In light of the relative strength of the government's interests, the Act is constitutional under the undue-burden standard. Any different understanding would be at odds with one of the central objectives of the joint opinion in *Casey*: *i.e.*, to accommodate more fully the government's paramount interest in protecting potential human life.

This case is distinguishable from *Stenberg* in several important respects, and, as explained, under a proper reading of *Stenberg*, respondents' facial challenge to the constitutionality of the Act fails. To the extent that the Court concludes that *Stenberg* compels the conclusion that the Act is facially invalid, however, *Stenberg* should be overruled.

II. The Act readily passes muster under overbreadth and vagueness principles as well. Unlike the statute at issue in *Stenberg*, the Act does not reach standard D&E abortions, but instead is limited to abortions in which the physician delivers the fetus beyond a specified anatomical "landmark" and then performs a discrete "overt act" that kills the living fetus (and delivers the fetus with the purpose of performing that act). The Act therefore does not cover any abortion that does not qualify as a "partial-birth abortion" under any reasonable understanding of that concept. Nor is the Act void for vagueness. It provides ample notice of the conduct that it prohibits and contains no ambiguous terms or phrases. Moreover, because this case, unlike *Stenberg*, involves a *federal* statute,

there is no obstacle to this Court's construing the statute to avoid any perceived overbreadth or vagueness difficulties.

III. Because the Act suffers from no constitutional defect, the Court need not fashion any remedy. If the Court nevertheless concludes that the Act is unconstitutional in any respect, it may be possible to craft narrower injunctive relief under *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). Because that inquiry necessarily entails a statute-specific consideration of legislative intent, in light of an identified constitutional difficulty with the statute, it would be appropriate for the Court to leave that issue for remand, as it did in *Ayotte*. In any event, because the statute is in fact facially constitutional, no remedial question arises in this case, and the judgment below should be reversed.

ARGUMENT

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003 IS CONSTITUTIONAL ON ITS FACE

In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the controlling joint opinion surveyed the Court's abortion jurisprudence since *Roe* v. *Wade*, 410 U.S. 113 (1973), and concluded that the portion of *Roe* recognizing "the State's 'important and legitimate interest in potential life' * * * has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Casey*, 505 U.S. at 871 (quoting *Roe*, 410 U.S. at 427). Thus, while the joint opinion reaffirmed "the central holding of *Roe*," *id.* at 879, it abandoned *Roe*'s strict-scrutiny approach in favor of an "undue burden" standard that would provide a more "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id.* at 876. Under that framework, an abortion regulation is constitutional unless it places a "substantial obstacle" in the way of a woman's access to an abortion. *Id.* at 877.

Since *Casey*, Congress and some 30 States have passed laws banning partial-birth abortion—a gruesome and rarely used procedure that, as Congress found, legislatures have a "compelling interest in prohibiting," not only to promote the government's paramount interest in protecting human life, but also to "promot[e] maternal health" and "draw a bright line that clearly distinguishes abortion and infanticide." Act § 2(14)(G), 117 Stat. 1205. In *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), this Court held that a State's partial-birth abortion statute was unconstitutional under *Casey*'s undue-burden standard. The question in *Stenberg* divided even the Justices who jointly wrote the controlling opinion in *Casey*, with Justice Kennedy concluding that the majority was undervaluing "critical state interests" and thus ignoring the central lesson of *Casey*. *Stenberg*, 530 U.S. at 957 (dissenting opinion).

This case differs from *Stenberg* in critical respects. For example, this case involves an Act of Congress that is accompanied by extensive findings; the Act contains a more targeted definition of partial-birth abortion and, as a federal statute, can be construed by the Court to avoid difficulties; and this case reaches the Court on a different, and more extensive, trial record. Recognizing those differences, giving proper weight to Congress's findings, and acknowledging the government's compelling interests, should yield only one conclusion—that the Act is constitutional on its face.

I. THE ABSENCE OF A HEALTH EXCEPTION DOES NOT RENDER THE ACT FACIALLY INVALID

The court of appeals held that the Partial-Birth Abortion Ban Act of 2003 was facially invalid because it lacked a health exception. That holding was based on the fallacious premise that a statute regulating an abortion procedure must contain a health exception as long as there is a *division of medical opinion* on whether the statute would create substantial

health risks. This Court's decisions, however, hold that such a statute is facially invalid only where it would create significant health risks, such that it would create an undue burden by imposing a substantial obstacle in the path of a woman seeking an abortion, in a large fraction of its applications. Viewed in the proper light, the Act readily survives scrutiny because the record—including Congress's considered findings, which are entitled to deference—overwhelmingly demonstrates that the partial-birth abortion procedure at issue is *never* medically indicated to preserve the health of the mother. Moreover, even if partial-birth abortion had *marginal* health benefits in some cases, that still would not be sufficient to overcome Congress's compelling interests in protecting potential human life, drawing a bright line between abortion and infanticide, and prohibiting a rarely used, late-term abortion procedure that is inhumane.

A. A Statute That Regulates Abortion, But Lacks A Health Exception, Is Not Facially Invalid Unless It Would Create Significant Health Risks, And Thereby Impose An Undue Burden, In A Large Fraction Of Its Applications

1. This Court has held that "a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the mother." *Ayotte* v. *Planned Parenthood of N. New England*, 126 S. Ct. 961, 966-967 (2006) (internal quotation marks omitted). That proposition originates from the Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). After determining that a State's interest in potential life became compelling at the point of viability, *id.* at 164, the Court concluded that, "subsequent to viability, the State * * * may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," *id.* at 164-165.

In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the joint opinion concluded that regulations that imposed an "undue burden" on a woman's access to an abortion were unconstitutional, explaining that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. Applying that standard, the Court sustained all of the regulations at issue in *Casey* (except for a spousal-notification provision), including a blanket statutory exception for cases involving medical emergencies. *Id.* at 879-880. As a factual matter, the Court rejected the contention that the statutory exception for medical emergencies "foreclose[d] the possibility of an immediate abortion despite some significant health risks" and was thus too narrow. *Id.* at 880. In so doing, the Court stated that "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Ibid.*

2. a. In *Stenberg*, the Court "applie[d]" the "legal principles" from *Roe* and *Casey* "to the circumstances" of a specific Nebraska statute based on a particular factual record. 530 U.S. at 921; see *id.* at 929-930, 938. The Court held that a statute prohibiting a particular abortion procedure without an express health exception would be unconstitutional if the statute would "create significant health risks": *i.e.*, health risks significant enough to constitute an undue burden. *Id.* at 932; see *id.* at 931 (noting that "a State cannot subject women's health to significant risks"); *id.* at 938 (concluding that the statute at issue "creates a significant health risk"). The Court appeared to recognize that, unlike a statute entirely prohibiting abortion (which would create significant health risks where "the pregnancy *itself* creates a threat to health"), a statute prohibiting a particular abortion procedure would

create significant health risks by prohibiting a procedure that is substantially safer than other procedures, either more generally or in specific circumstances (*e.g.*, where the mother has a particular health-threatening condition). *Id.* at 931.[1]

Applying that standard, the Court, pointing to the district court's findings and evidence, held that the plaintiff had demonstrated that the statute at issue would create significant health risks. *Stenberg*, 530 U.S. at 932. The Court noted that the district court had found that "the D&X method was significantly *safer* in certain circumstances." *Id.* at 934; see *id.* at 936 (noting the "District Court finding that D&X significantly obviates health risks in certain circumstances"). The Court also noted that the State had "fail[ed] to demonstrate that banning D&X without a health exception may not create significant health risks for women." *Id.* at 932; see *id.* at 937-938. Having concluded, on the discrete record before it, that "a statute that altogether forbids D&X creates a significant health risk," the Court held the statute unconstitutional because it lacked a health exception. *Id.* at 938.[2]

b. To be sure, some language in the Court's opinion in *Stenberg* could be read, in isolation, to suggest that a statute prohibiting a particular abortion procedure would be unconstitutional as long as there is *conflicting evidence* as to whether the statute at issue would create significant health

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[1] A statute that prohibits a procedure that is safer only in specific circumstances presumably could be enjoined only as to those specific applications—a result reinforced by this Court's recent decision in *Ayotte*.

[2] In *Stenberg*, the Court did not expressly state which party—the plaintiff or the State—bore the ultimate burden of persuasion on the question whether the statute at issue would create significant health risks. In a facial challenge, however, the plaintiff ordinarily bears the burden of proof. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). That placement of the burden is particularly appropriate where the gravamen of the challenge is that Congress itself has misapprehended the relevant risks.

risks. See, *e.g.*, 530 U.S. at 938 (indicating that a health exception was necessary "where *substantial medical authority* supports the proposition that banning a particular abortion procedure could endanger women's health") (emphasis added); *id.* at 936-937 (noting "a division of opinion among some medical experts over whether D&X is generally safer" and suggesting that "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence").

In *Stenberg*, however, the Court did not hold that the appropriate constitutional test was whether the plaintiff had established a division of medical opinion concerning the health risks of a ban on partial-birth abortion. As the principal dissenting opinions in *Stenberg* noted, such a test would effectively render it impossible to sustain a statute prohibiting a particular method of abortion against a facial challenge, insofar as "there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable." 530 U.S. at 1012 (opinion of Thomas, J.); see *id.* at 969 (opinion of Kennedy, J.) (noting that "[t]he standard of medical practice cannot depend on the individual views of [the plaintiff] and his supporters"). The Court responded that it was not suggesting that "a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable." *Id.* at 938. *Stenberg* therefore did not establish a rule that a plaintiff need only identify a division of opinion among medical experts on the existence of significant health risks.

A contrary reading of *Stenberg*, moreover, would be inconsistent with this Court's previous abortion decisions. In *Casey*, for example, the Court held only that it would be unconstitutional for a State to prohibit or restrict abortion where the regulation at issue would "interfere with a woman's choice to undergo an abortion procedure if continuing her

pregnancy would constitute a threat to her health," 505 U.S. at 880, without any suggestion that it would be sufficient for the plaintiff to demonstrate merely that there were *conflicting medical opinions* on whether "continuing her pregnancy would constitute a threat to her health." Because the Court emphasized in *Stenberg* that it was merely applying, and not modifying, *Casey*, see 530 U.S. at 938, there is no reason to attribute such a substantial doctrinal shift to *Stenberg*.

In addition, a contrary reading of *Stenberg* would be at odds with traditional standards of proof. Whereas a plaintiff who identified a dispute on a constitutionally relevant question of fact would ordinarily be entitled only to survive a motion for summary judgment, a plaintiff who demonstrated the existence of a dispute on the medical necessity for a particular abortion procedure would be entitled to *prevail on the merits*. If *Stenberg* meant to introduce such an innovation in civil procedure in the abortion context, it presumably would have made that intent far more manifest.

In short, the proper understanding of *Stenberg*, and the one that best squares with this Court's precedents, is that a plaintiff challenging an abortion regulation that lacks a health exception must actually prove that the regulation at issue would create significant health risks for women, such that the absence of a health exception would impose an undue burden.

3. Like this case, *Stenberg* involved a facial challenge to an abortion regulation that lacked a health exception. In *Stenberg*, however, the Court did not expressly address the question whether a plaintiff bringing such a facial challenge must demonstrate that the statute is unconstitutional—*i.e.*, that the statute would create significant health risks—in all, or merely most or many, of its applications. For the reasons discussed at greater length in the government's brief (at 9-12) in *Ayotte* (No. 04-1144), the better view is that a plaintiff bringing a facial challenge must show that the statute is in-

valid in *all* its applications. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739 (1987). At most, however, *Stenberg* stands only for the proposition that a plaintiff bringing a facial challenge to an abortion regulation that lacks a health exception must demonstrate that the statute would create significant health risks for at least a "large fraction" of women covered by the statute.[3] And because the federal Act is facially constitutional under the "large fraction" test, there is no occasion in this case for the Court to choose between that test and *Salerno*'s "no set of circumstances" test.

Respondents suggest (Br. in Opp. 27-28) that *Stenberg* adopted a more permissive standard for facial challenges than either the "no set of circumstances" standard from *Salerno* or the "large fraction" standard from *Casey*, and instead held that a plaintiff bringing a facial challenge to an abortion regulation that lacks a health exception need only demonstrate that the statute would create significant health risks in a small percentage of its applications. That reading of *Stenberg*, however, not only would belie the Court's assertion that the requirement of a health exception constituted "simply a straightforward application of [*Casey*'s] holding," 530 U.S. at 938, but would entirely subvert the *Salerno* standard by allowing a plaintiff to obtain facial invalidation of a statute simply by showing that the statute had a few unconstitutional applications. Such a virtual presumption of facial invalidity would be difficult to reconcile with this Court's other abortion

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[3] In *Stenberg*, the Court repeatedly noted that the critical question was whether the statute would pose "*significant* health risks for women." 530 U.S. at 932 (emphasis added); see *id.* at 931, 938. While that formulation appeared to state the relevant *constitutional* test, it can be read to suggest that the plaintiff must show that the statute would pose a substantial health risk to (and therefore impose an undue burden on) at least a "significant" number of women covered by the statute—a rule that would be consistent with the "large fraction" formulation from the joint opinion in *Casey*. 505 U.S. at 893, 894-895.

decisions, which have upheld applications of abortion regulations while acknowledging the potential for other, unconstitutional applications, see, *e.g.*, *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990); *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *H.L.* v. *Matheson*, 450 U.S. 398, 405-407 (1981); *Connecticut* v. *Menillo*, 423 U.S. 9, 11 (1975), and with this Court's decisions in other contexts, even the unique context of the First Amendment, see, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 772 (1982). Indeed, if the absence of a health exception suffices to invalidate a statute on its face, then this Court's decision in *Ayotte* to vacate, rather than affirm, the injunction of the New Hampshire parental-notification statute at issue in its entirety is difficult to understand. Instead, *Stenberg*, as properly understood, teaches that a statute that regulates a particular abortion procedure, but lacks a health exception, is not facially invalid unless, at a minimum, the statute would create significant health risks in a large fraction of its applications.

B. When Analyzed Under The Proper Standard, The Record Overwhelmingly Supports Congress's Judgment That No Health Exception Was Required

In enacting the Partial-Birth Abortion Ban Act of 2003, Congress made numerous findings, culminating in the ultimate finding that partial-birth abortion is *never* medically indicated to preserve the health of the mother. Consistent with the constitutional rule established by this Court's precedents, Congress therefore was entitled to conclude not only that a health exception was not constitutionally required, but that a health exception would effectively undermine the critical state interests that Congress sought to advance. The court of appeals, however, refused to defer to Congress's findings on the assumption that *Stenberg* effectively foreclosed Congress from making them. That was error.

1. Congressional Findings On Constitutionally Relevant Factual Issues Are Entitled To Great Deference

This Court has long held that courts should afford a high degree of deference to congressional factual findings that inform the constitutionality of federal statutes. In *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), the Court set out the principles governing judicial review of congressional findings. The Court held that, "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'" *Id.* at 195 (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (*Turner I*) (plurality opinion)). The Court further noted that "[the] sole obligation [of a court] is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Ibid.* (quoting *Turner I*, 512 U.S. at 666 (plurality opinion)). The Court stressed that, where *congressional* factfinding is at issue, "substantiality is to be measured * * * by a standard more deferential" than even the standard applicable to *agency* factfinding. *Ibid.* That deference is appropriate, the Court explained, both because "[Congress] is far better equipped than the judiciary to amass and evaluate * * * data bearing upon legislative questions," *ibid.* (citations and internal quotation marks omitted), and because "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," *id.* at 199.

This Court has deferred to congressional factual findings in a wide variety of contexts and with regard to a wide variety of constitutional claims. In *Turner II*, for example, in rejecting a Free Speech Clause challenge to statutory provisions requiring cable-television systems to carry local television stations, the Court deferred to express statutory findings, including Congress's ultimate finding that the provisions were

necessary to preserve those stations. The Court reasoned that, "[e]ven in the realm of First Amendment questions," deference was due to "[Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end." 520 U.S. at 196.[4]

Congressional findings on medical or scientific issues are not subject to a different rule. In *Jones* v. *United States*, 463 U.S. 354 (1983), for example, in rejecting a due process challenge to a statute providing for the indefinite civil commitment of certain individuals acquitted by reason of insanity, the Court deferred to a congressional finding that those individuals were likely to be dangerous. The Court rejected the plaintiff's contention that there was conflicting psychiatric research on the issue, concluding that "[t]he lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Id.* at 365 n.13.

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[4] See, *e.g.*, *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) (rejecting Establishment Clause challenge to Equal Access Act in part based on a congressional finding that high-school students were unlikely to confuse an equal-access policy with state sponsorship of religion; "[g]iven the deference due the duly enacted and carefully considered decision of a coequal and representative branch of our Government, we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations") (citations and internal quotation marks omitted); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (rejecting due process challenge to statutory limit on attorneys' fees in certain administrative proceedings in part based on congressional findings that attorneys were generally unnecessary in such proceedings; "[w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue"); *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (rejecting equal protection challenge to male-only draft registration in part based on a congressional finding that, because women then served only in non-combat roles, it would be unnecessary to draft women to fill those roles).

And in *Lambert* v. *Yellowley*, 272 U.S. 581 (1926), in rejecting a contention that physicians were constitutionally entitled to prescribe alcohol for patients for whom they believed it to be medically necessary, the Court deferred to an "implicit congressional finding" that alcohol had no medicinal uses. *Id.* at 595. The Court recognized that "practicing physicians differ[ed] about the value" of using alcohol for medicinal purposes, *id.* at 590, but reasoned that Congress could permissibly conclude that it had no medicinal uses in the absence of any consensus *to the contrary*, *id.* at 594-595.[5]

Congress's findings in enacting the Partial-Birth Abortion Ban Act of 2003—including its ultimate finding that partial-birth abortion "is never medically necessary," Act § 2(1), 117 Stat. 1203—are based on an extensive legislative record. They concern complex medical matters as to which courts lack any particular institutional expertise. And they are entitled to the same degree of respect as other congressional findings to which this Court has traditionally deferred.

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[5] See, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976) (rejecting due process challenge to a statute prohibiting reliance on negative X-rays in denial of disability claims, in deference to a congressional determination that such X-ray evidence was unreliable; "the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress" and "it is primarily for Congress to amass the stuff of actual experience and cull conclusions from it"); *Marshall* v. *United States*, 414 U.S. 417, 427 (1974) (rejecting equal protection challenge to statute mandating incarceration rather than treatment for drug addicts with two prior felony convictions; "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, * * * courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices"); cf. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 493 (2001) (noting Court's inability to "override a legislative determination manifest in a statute" about the medical value of marijuana).

2. *Congress's Findings On The Medical Necessity Of Partial-Birth Abortion Are Entitled To Deference*

a. Respondents contend that, although this Court has generally deferred to congressional findings of fact that bear on the constitutionality of federal statutes, that principle is inapplicable here. That contention should be rejected.

i. Respondents assert (Br. in Opp. 18-20) that congressional findings are not entitled to deference unless the findings at issue are "predictive." As a preliminary matter, and contrary to respondents' suggestion (*id.* at 18), Congress was in fact "making predictions about the *future* impact of legislation" in this case: namely, predictions about the likely health effects of prohibiting a particular type of abortion procedure. More fundamentally, however, where Congress makes a predictive judgment about the effects of proposed legislation, it inevitably relies on data concerning the status quo in making that judgment. Thus, in *Turner II*, Congress's finding that the "must-carry" provisions at issue would be necessary to preserve local television stations was predicated on its assessment of then-existing conditions in the local broadcasting industry. See 520 U.S. at 195-196. So too in this case, Congress's finding that the abortion procedure at issue was never (and thus would never be) necessary to preserve the mother's health was concededly based on evidence concerning the "current state of medicine" (Br. in Opp. 18-19): namely, evidence concerning the *current* use of the procedure.

Nor would it be logical to defer to "predictive" congressional findings only when they are based wholly on conjecture, and not when they are grounded in empirical data. To the contrary, a fundamental rationale for deference to congressional findings is that Congress "is far better equipped than the judiciary to amass and evaluate * * * *data* bearing upon legislative questions." *Turner II*, 520 U.S. at 195 (emphasis

added) (internal quotation marks omitted). It is thus unsurprising that this Court has deferred to Congress's predictive judgments on medical and scientific issues, even (or especially) where those judgments were based on the "current state" of the evidence. See, *e.g.*, *Jones*, 463 U.S. at 363-366 & n.13; *Lambert*, 272 U.S. at 588-597; cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997) (noting that "it is precisely where * * * disagreement [among medical experts] exists that legislatures have been afforded the widest latitude in drafting * * * statutes").

ii. Respondents alternatively suggest (Br. in Opp. 20-24) that congressional findings are not entitled to deference in cases "involving a burden on a constitutional right, infringement of which is subject to heightened scrutiny." That contention, however, is refuted by *Turner II*, which involved a content-neutral regulation subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). See *Turner II*, 520 U.S. at 185, 189-190. As courts have noted, the undue-burden standard applicable to abortion regulations under the joint opinion in *Casey* closely resembles an intermediate-scrutiny standard. See, *e.g.*, *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 549 (9th Cir. 2004). Moreover, this Court has deferred to congressional findings in a number of other cases involving fundamental constitutional rights and different levels of scrutiny.[6] There is therefore no principled basis for holding that the degree of deference owed to congressional findings depends on the level of scrutiny applicable to the right at issue.[7]

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[6] See, *e.g.*, *Mergens*, 496 U.S. at 250-251 (Establishment Clause); *Walters*, 473 U.S. at 320-334 (Due Process Clause); *Jones*, 463 U.S. at 361 (Due Process Clause); *Rostker*, 453 U.S. at 69 (equal protection component of Due Process Clause); *Lambert*, 272 U.S. at 588 (Due Process Clause).

[7] Respondents rely (Br. in Opp. 20-21) on this Court's decisions in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Sable Communi-*

iii. Respondents contend (Br. in Opp. 21) that, in several of the cases cited above involving issues of medical or scientific judgment, Congress did not defer to "legislative findings" at all. It is true that, in a number of those cases, Congress did not make express findings *in the text of the statute*, but instead made *implicit* findings about a disputed question of fact that was relevant to the constitutional claim at issue. Other cases, including *Turner II*, involved express statutory findings. See *Turner I*, 512 U.S. at 632-634 (plurality opinion) (listing findings). In any event, Court's willingness to defer even to implied findings by Congress only strengthens the case for deference where, as here, Congress deliberately and unambiguously made explicit findings based on testimony and other evidence received in extensive legislative hearings. See Act § 2(14), 117 Stat. 1204-1206.

b. The court of appeals took a different approach. It reasoned that Congress was not "free to disagree with the Supreme Court's determination [concerning the medical necessity of partial-birth abortion] because the Court's conclusions are final on matters of constitutional law." Pet. App. 18a. That reasoning is deeply flawed. In passing the Act, Congress did not attempt to supersede the constitutional *rule* applied in *Stenberg*—*i.e.*, the rule that a statute prohibiting a particular abortion procedure would be unconstitutional where the statute would create significant health risks. 530

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cations of California, Inc. v. *FCC*, 492 U.S. 115 (1989); and *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). None of those cases, however, stands for the proposition that congressional findings are not entitled to deference where heightened scrutiny is involved. *Landmark* did not even involve a federal statute; *Sable* rejected a request for deference on the ground that "the congressional record contain[ed] no legislative findings" germane to the constitutional question presented, 492 U.S. at 129; and *Free Speech Coalition* likewise rejected a request for deference on the ground that the congressional finding at issue was legally irrelevant, 535 U.S. at 253.

U.S. at 932. To the contrary, Congress expressly took into account the constitutional rule of *Stenberg* and proceeded to make findings on a factual issue (indeed, the central factual issue) relevant to the *application* of that constitutional rule—*viz.*, whether partial-birth abortion was in fact medically necessary. See Act § 2(3)-(8), 117 Stat. 1201-1202. In *Stenberg*, the Court expressly characterized that issue as a "factual question" (and ultimately concluded that the plaintiff had demonstrated that the statute at issue would in fact create significant health risks). *Ibid.* This case is therefore crucially different from cases in which Congress either sought to supersede a constitutional ruling of this Court, see *Dickerson* v. *United States*, 530 U.S. 428 (2000), or made findings that were simply insufficient to sustain a statute's constitutionality, see *United States* v. *Morrison*, 529 U.S. 598 (2000).[8]

The court of appeals also suggested that, even if the medical necessity of partial-birth abortion were a question of fact, it was a question of "legislative" fact, and *Stenberg* thus foreclosed Congress from making findings on that question. Pet. App. 16a-20a. As a preliminary matter, in *Stenberg*, no federal statute was at issue, and there were no congressional findings on the necessity for a health exception. Accordingly, nothing in *Stenberg* suggests that the Court intended to bar Congress from deliberating on the issue and making its own findings, and thus to carve out an "abortion-only" exception to the customary rule that congressional findings concerning the constitutionality of federal statutes are entitled to defer-

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[8] It was appropriate—indeed, desirable—for Congress carefully to consider this Court's precedents, including *Stenberg*, in determining whether the record before it would support the enactment of legislation that would survive constitutional challenge. See *Rostker*, 453 U.S. at 64 (noting that "[t]he customary deference accorded to judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality").

ence. Indeed, the lower court's conclusion that *Stenberg* estopped it from giving deference to Congress's findings is analogous to the error this Court corrected in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 125 S. Ct. 2688 (2005). Just as a prior judicial determination about the meaning of an ambiguous statute does not deprive a later administrative construction of the deference that it would otherwise be due, see *id.* at 2700-2702, an earlier judicial finding of fact likewise does not deprive a later congressional finding of deference. Indeed, the error here is much more obvious. In *Brand X*, the statute to be construed was the same, while here, Congress passed the statute at issue based on a different, and more extensive, record.

Even assuming that the medical necessity of partial-birth abortion is accurately labeled a "legislative" fact, moreover, it does not follow that this Court's determination on a question of "legislative" fact somehow forecloses *Congress* from subsequently making contrary findings on the same question. After all, the very concept of "legislative" facts is premised on the assumption that such facts are ones that the *legislature* is uniquely well-equipped to find, in light of the legislature's superior capacity to "amass and evaluate the vast amounts of data" relevant to such factfinding. *Turner II*, 520 U.S. at 195 (citations omitted). At most, to the extent that this Court's decision in *Stenberg* could be read as treating the medical necessity of partial-birth abortion as a question of "legislative" fact, its resolution of that factual issue would merely foreclose lower *courts* from making contrary findings, in order to ensure that those courts do not reach inconsistent results on the constitutionality of materially identical legislation. See *A Woman's Choice—East Side Women's Clinic* v. *Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (noting that "treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands"), cert.

denied, 537 U.S. 1192 (2003). It would not permanently foreclose *Congress* from making contrary findings.

In any event, the better reading of *Stenberg* is that it did not treat the medical necessity of partial-birth abortion as a question of "legislative" fact at all. Although the Court noted that other district courts had generally "reached similar factual conclusions" to that reached by the district court in *Stenberg*, 530 U.S. at 932, and quoted at some length from statements made by a physician group in an amicus brief, *id.* at 935, 936, the Court primarily relied on the evidence presented to, and the factual findings made by, the district court, see, *e.g.*, *id.* at 931-932, 934, 936-937. The district court, in turn, made clear that it was considering partial-birth abortion only as it was performed by the plaintiff in that case —perhaps not surprisingly, given that the court appeared to view the plaintiff's claim as an as-applied challenge. *Carhart* v. *Stenberg*, 11 F. Supp. 2d 1099, 1120 (D. Neb. 1998) (noting "the absence of specific evidence about other doctors and patients"), aff'd, 192 F.3d 1142 (8th Cir. 1999).

The practical consequence of the court of appeals' approach would thus be to treat the factual findings of the *district court* in *Stenberg*, based on the particular circumstances of the plaintiff before it and made following a trial that lasted only *one day*, as binding nationwide and effectively foreclosing Congress from making contrary findings on the same topic—despite the fact that Congress made its findings based on a more recent, and more robust, evidentiary record. See Act § 2(5), 117 Stat. 1202 (noting that "much of [the evidence presented to Congress] was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record"). Because *Stenberg* did not foreclose Congress from making factual findings on the necessity of partial-birth abortion, but instead merely upheld the district court's findings in that case on the particular record before it, the court

of appeals clearly erred by refusing to defer to Congress's findings.

3. *Congress's Findings On The Medical Necessity Of Partial-Birth Abortion Are Supported By Substantial Evidence*

While the court of appeals refused to defer to Congress's factual findings at all, the district court seemingly recognized that Congress's findings were entitled to deference, but instead held that Congress's findings were not supported by substantial evidence. In analyzing Congress's findings, however, the district court asked the wrong question: namely, whether substantial evidence supported the proposition that *no substantial medical authority* supported the proposition that partial-birth abortion was ever necessary to preserve the mother's health. Pet. App. 460a-461a. The relevant question is instead whether substantial evidence supported Congress's ultimate finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Act § 2(14)(O), 117 Stat. 1206.[9] Because substantial evidence plainly supported *that* finding, it is entitled to deference, and respondents' contention that the Act is facially invalid because it lacks a health exception should be rejected.

a. In engaging in "substantial evidence" review, a reviewing court should not "reweigh the evidence *de novo*, or * * *

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[9] Even if *Stenberg* were read to hold that the relevant constitutional test was whether the plaintiff had presented substantial medical authority in support of the proposition that prohibiting D&X abortions would create significant health risks, but see pp. 16-18, *supra*, such a test should apply only in the *absence* of congressional findings, not in the face of them, in light of Congress's comparative expertise in making findings on issues of medical or scientific judgment. Cf. *Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting) (noting that courts "are ill-equipped to evaluate the relative worth of particular surgical procedures" and that legislatures "have superior factfinding capabilities in this regard").

replace Congress' factual predictions with [its] own." *Turner II*, 520 U.S. at 211. Instead, a reviewing court is required to defer to a congressional finding even if the "evidence is in conflict" and inconsistent conclusions could thus be drawn from that evidence. *Ibid.*; see *id.* at 208, 210. Although a reviewing court may consider not only the evidence that was before Congress, but also any evidence adduced at trial, in engaging in "substantial evidence" review, *id.* at 195, 212, the critical inquiry is whether there is sufficient evidence to suggest that *Congress's* determination was reasonable —not whether the reviewing court would reach the same determination as Congress on the basis of the record that Congress had before it (as supplemented by any evidence adduced at trial). See, *e.g.*, *id.* at 210-211; *Rostker*, 453 U.S. at 82-83.

b. Substantial evidence supported Congress's finding that partial-birth abortion is never necessary to preserve the mother's health.

i. *Testimony from physicians.* As the district court acknowledged, most of the physicians who appeared before Congress testified in favor of the Act. Pet. App. 58a. Their testimony strongly supported Congress's findings concerning the medical necessity of partial-birth abortion.

Dr. Kathi Aultman, a fellow of the American College of Obstetricians and Gynecologists (ACOG), testified that "[t]he ban on partial-birth abortion would not endanger a woman's health because it isn't medically necessary and there are standard alternative methods available at every gestational age." She stated that "there does not appear to be any identified situation in which intact D&X is the only appropriate [abortion] procedure." She suggested that, because lengthy dilation is required before a partial-birth abortion can be performed, partial-birth abortion could not be used where a woman required an immediate abortion because of a medical emergency. And she noted that D&X abortions may pose

greater health risks than D&E abortions: namely, an increased risk of cervical incompetence and similar or greater risks of hemorrhaging, infection, and other complications. Pet. C.A. App. 578-584.

Dr. Curtis Cook, an assistant professor of medicine at Michigan State University and ACOG fellow specializing in maternal-fetal medicine, testified that, in ten years, he had never "experienced a single clinical situation where [partial-birth abortion] has ever been required or even considered a superior option clinically" to other types of abortion. He further testified that he had consulted with his colleagues and had "yet to find a single individual who has experienced a clinical situation that would require this procedure." He suggested that partial-birth abortion presented various safety risks, including "potential cervical complications" from the placement of multiple dilators into the cervix; additional risks from the internal rotation of the fetus to a feet-first position, a practice that "has been largely abandoned in modern obstetrics"; and other risks, including hemorrhaging and infection. He stated that he had been contacted by women who had suffered "subsequent pregnancy complications" after undergoing partial-birth abortions. Pet. C.A. App. 544-546, 597-600, 610.

Dr. Mark Neerhof, an associate professor of obstetrics and gynecology at Northwestern University specializing in maternal-fetal medicine, testified that partial-birth abortion "poses serious medical risks to the mother." He contended that the rotation of the fetus "carries risks of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus," and that the use of a sharp object to puncture the skull of the fetus presents "the risk of iatrogenic laceration and secondary hemorrhage." He added that "[n]one of these risks are medically necessary because other procedures are available" for late-term abortions. Pet. C.A. App. 862-866.

Dr. Nancy Romer, a professor of obstetrics and gynecology at Wright State University and ACOG fellow, testified that, "[i]f [partial-birth abortion] truly were superior to other methods of second-trimester termination, there would be more physicians using it; there would be more physicians trained in it; and it would be described in the medical literature." She asserted that partial-birth abortion "offers no advantage in safety nor efficacy over other methods of termination," and that physicians at her hospital "have never found it necessary to perform this procedure to save the life of a woman" and "have found alternatives that we feel are equally efficacious and safe." Pet. C.A. App. 161-163.

Finally, Dr. Pamela Smith, director of medical education in the obstetrics and gynecology department at Mount Sinai Hospital in Chicago and ACOG member, testified that "there are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life or health of the mother." She added that the extended dilation of the cervix during partial-birth abortions could lead to cervical incompetence, threatening the future fertility of the patient; that the rotation of the fetus risks trauma to the mother; and that the use of a sharp instrument makes it "very easy to accidentally poke a hole" in the uterus or cervix. She concluded that partial-birth abortion is "too lengthy" and "too risky" and that "there are too many other alternatives." Pet. C.A. App. 144-148, 218.[10]

ii. *Other evidence.* In addition to the testimony of physicians who appeared before Congress, other evidence in the legislative record—including statements from leading physi-

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[10] In addition, Congress heard testimony (and received evidence) from a significant number of opponents of a ban on partial-birth abortion. See, *e.g.*, Pet. C.A. App. 63-67, 446-447, 568, 646-649, 1042-1044. Congress also invited several well-known practitioners of partial-birth abortion to testify at committee hearings, but they declined to appear. See, *e.g.*, *id.* at 63.

cian groups, articles in medical journals, and written statements from other physicians—supported Congress's findings.

In making its findings, Congress expressly credited the conclusion of the American Medical Association (AMA) that partial-birth abortion is "never the only appropriate [abortion] procedure." Act § 2(14)(C), 117 Stat. 1204 (internal quotation marks omitted). The AMA expressed that conclusion in a variety of different ways. The AMA's board of trustees issued a report in which it stated that, "[a]ccording to the scientific literature, there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." In a separate fact sheet concerning the AMA's support for an earlier version of the Act, the board of trustees noted that "AMA's expert panel * * * could not find any identified circumstance where [D&X] was the only appropriate alternative" (internal quotation marks omitted). And in a press release, the AMA noted that partial-birth abortion is "broadly disfavored * * * both by experts and by the public," and added that "[i]t is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." Pet. C.A. App. 758, 775, 1002, 1004.

Although ACOG, unlike the AMA, opposed earlier versions of the Act, it reached a similar conclusion about the medical necessity of partial-birth abortion. In a formal policy statement issued in 1997 and then reaffirmed in 2000, ACOG conceded that "[a] select panel convened by ACOG could identify no circumstances under which [partial-birth abortion] would be the only option to save the life or preserve the health of the woman." Although ACOG proceeded to suggest that partial-birth abortion "may be the best or most appropriate procedure *in a particular circumstance* to save the life or preserve the health of the woman" (emphasis added), ACOG did not identify any circumstance in which that would be true.

While ACOG's vice president likewise asserted in a letter that "there are rare occasions when intact D&X is the most appropriate procedure" and "is medically necessary," he also failed to elaborate on that assertion. Pet. C.A. App. 1056, 1297.

Moreover, Congress considered various articles in medical journals which expressed similar doubts about the medical necessity of partial-birth abortion. For example, in an article published in the Journal of the American Medical Association, Dr. LeRoy Sprang and Dr. Neerhof stated that "[t]here exist no credible studies on intact D&X that evaluate or attest to its safety"; that the procedure may increase the risk of uterine rupture because of the necessity of rotating the fetus into a feet-first position; that the procedure "could result in severe bleeding and the threat of shock or even maternal death" from the use of a sharp object to puncture the skull of the fetus; and that none of those risks is "medically necessary," because "other procedures are available" for late-term abortions. Pet. C.A. App. 896-899.

Finally, in addition to the physicians who appeared before Congress, numerous other physicians submitted written statements attesting that partial-birth abortion is never medically necessary. For example, Dr. Camilla Hersh, an assistant professor of obstetrics and gynecology at Georgetown University and ACOG fellow, wrote that partial-birth abortion presents risks of cervical incompetence, serious infection, and hemorrhaging. She also rejected the argument that partial-birth abortion was necessary in cases involving various specific maternal or fetal conditions. Pet. C.A. App. 969-972.

iii. *Trial evidence.* At trial, still other physicians testified that partial-birth abortion was never medically necessary, thereby confirming the reasonableness of Congress's findings. Dr. Watson Bowes, a professor emeritus of obstetrics and gynecology at the University of North Carolina specializing in maternal-fetal medicine, testified that he had never seen a

situation in which, in his view, there would be any advantage to using partial-birth abortion over any other type of abortion. J.A. 260-263, 268.

Dr. Steven Clark, a professor of obstetrics and gynecology at the University of Utah and ACOG member specializing in maternal-fetal medicine, testified that "under no circumstance is D&X abortion necessary to preserve the life or health of the mother" and that "there are in fact grave concerns regarding the long-term safety of this procedure." He explained that it was "very rare" that an abortion would ever be necessary to preserve the health of the mother, and that D&E was an "incredibly safe procedure with negligble risk of serious complications in skilled hands." He then reviewed each of the various specific conditions for which partial-birth abortion was allegedly the safest abortion method and explained that the asserted safety advantages were either hypothetical or nonexistent. He concluded that he could not "imagine any medical condition * * * in which this D&X procedure might be helpful" at any gestational age. J.A. 919, 922, 924; Pet. C.A. App. 2017, 2026, 2046, 2049-2106, 2121-2122.

Dr. Charles Lockwood, chairman of the department of obstetrics and gynecology at Yale University, testified that he was unaware of any medical evidence "that the D&X offers any safety advantage over D&E or medical induction," and that partial-birth abortion itself posed a potential long-term risk to maternal health. He explained in detail why partial-birth abortion would not be the safest method of abortion in cases involving various specific conditions, and concluded that he "really can't conceive of any specific condition that would specifically warrant a D&X." Notably, he so testified despite the fact that he was personally opposed to the Act. J.A. 391-399, 417-430, 436-438, 442.

Dr. Elizabeth Shadigian, an associate professor of obstetrics and gynecology at the University of Michigan and ACOG

fellow, testified that "there is no basis to say the D&X is safer than any other procedure." She stated that she could not "think of a situation" in which partial-birth abortion would be necessary "because of a particular type of health condition that the mother is facing in the pregnancy." J.A. 365-368, 372.

Finally, Dr. LeRoy Sprang, an ACOG fellow, testified that he had "never seen a situation where a D&X would be the safest, the best, or the only procedure to use to protect the health of the mother." He added that other physicians had been unable to identify a single situation in which partial-birth abortion would be the best method to preserve the mother's health. J.A. 282-289, 304, 305.[11]

c. To be sure, respondents presented evidence at trial suggesting that partial-birth abortion may be marginally safer than other types of abortion in specific circumstances (*e.g.*, where the mother has preeclampsia or placenta previa) or as a more categorical matter (*e.g.*, because a partial-birth abortion requires fewer instrument passes in the uterus than a standard D&E abortion).[12] As noted above, however, the

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[11] In addition, some of the testimony of *respondents'* experts supported Congress's findings. One of those experts, testifying anonymously, stated that there is no maternal health condition that would require a partial-birth abortion, rather than a D&E abortion. Pet. C.A. App. 1377. In addition, Dr. Cassing Hammond, an assistant professor of obstetrics and gynecology at Northwestern University and an ACOG member, testified that there are no objective scientific data to support the proposition that, to the extent that a standard D&E abortion requires more instrument passes in the uterus, it increases maternal risk. J.A. 742, 744, 817.

[12] The primary evidence on which respondents relied at trial, however, does not support the proposition that partial-birth abortion is ever medically necessary to preserve a mother's health. Respondents introduced a peer-reviewed study led by Dr. Stephen Chasen, a plaintiff in the Second Circuit litigation challenging the Act. That study, however, concluded that partial-birth abortion and standard D&E abortion had no significant differences in short-term complication rates, blood loss, or procedure time. Moreover,

mere existence of conflicting evidence does not render Congress's factual findings invalid. Indeed, to the extent that the district court concluded that there was *a division of medical opinion* on the medical necessity of partial-birth abortion, see, *e.g.*, Pet. App. 463a, the necessary implication is that substantial evidence would support the conclusion that partial-birth abortion was never medically necessary.

At various points in its opinion, the district court suggested that deference to Congress's factual findings was inappropriate because the physicians who testified that partial-birth abortion was never medically necessary did not carry out partial-birth abortions themselves. See, *e.g.*, Pet. App. 467a-468a. It is hardly surprising, however, that physicians who believed that partial-birth abortion was never medically necessary would *not* carry out such abortions. Many of those physicians, moreover, were maternal-fetal experts who specialized in treating women with high-risk pregnancies (including women who had suffered complications from abortions)—and who were therefore perfectly capable of assessing the risks that would attend partial-birth abortions, even if they did not conduct that particular type of abortion themselves. See J.A. 309-316, 399-400; Pet. C.A. App. 579, 610. Indeed, insofar as typical abortion providers, unlike physicians specializing in obstetrics and gynecology, do not provide long-term follow-up care to their patients, the testifying physicians were arguably *better* situated to assess long-term complications from abortions. See J.A. 182-183, 562-563, 864-865;

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because long-term follow-up was conducted with fewer than 20% of the subjects, the study contains no meaningful conclusions about long-term complications: most notably, the risk of cervical incompetence from partial-birth abortion. Indeed, the study showed a nearly threefold increase in the risk of premature birth in women who had undergone partial-birth abortions, which may result from the increased dilation used in the procedure. J.A. 479-494, 564-566, 615-617; Pet. C.A. App. 2114.

Pet. C.A. App. 1372. And the very fact that practitioners in the field repeatedly indicated that partial-birth abortions were never medically necessary or justified, despite the contrary opinions of a few fellow practitioners, suggests that any differences in safety are debatable and sufficiently marginal that most practitioners (and certainly, therefore, Congress) can confidently rule out the need to resort to the procedure. On the other hand, only a few physicians perform partial-birth abortions, and many of those physicians are general practitioners, not specialists or academics. See Pet. C.A. App. 161-162, 598, 606. There is thus no basis for concluding that *Congress's* findings were not supported by substantial evidence simply because the *district court* may have disagreed with Congress and concluded that the physicians who testified against the Act were more credible.

d. Although the district courts in the other two cases challenging the Act ultimately agreed with the district court's conclusion in this case concerning the validity of Congress's findings, those district courts made various findings of their own, based on virtually identical records, suggesting that substantial evidence would support the proposition that partial-birth abortion is never medically necessary. In *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), aff'd, 437 F.3d 278 (2d Cir. 2006), the district court ultimately found that "a division of medical opinion exists about the necessity of D&X to preserve women's health." 330 F. Supp. 2d at 482. However, after comprehensively reviewing the testimony on the comparative safety of various abortion procedures, *id.* at 467-474, 475-478, the court found that "the Government's expert witnesses reasonably and effectively refuted Plaintiffs' proffered bases for the opinion that D&X has safety advantages over other second-trimester abortion procedures." *Id.* at 479. The court also found that "[i]n no case * * * could Plaintiffs point to a specific patient

or actual circumstance in which D&X was necessary to protect a woman's health" and that "many of Plaintiffs' purported reasons for why D&X is medically necessary" are either "only theoretical" or "false." *Id.* at 480. Similarly, in *Planned Parenthood Federation of America, Inc.* v. *Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), aff'd, 435 F.3d 1163 (9th Cir. 2006), the district court ultimately found that "there continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D&E." 320 F. Supp. 2d at 1033. Like the district court in *National Abortion Federation*, however, the court found that "plaintiffs have not demonstrated the existence of any particular situation * * * in which an intact D&E would be a doctor's only option to preserve the life or health of a woman." *Id.* at 1002.

Like the district court in this case, therefore, those courts would likely have upheld the statute if they had focused on the correct question: namely, whether substantial evidence supported Congress's ultimate finding that partial-birth abortion is never necessary to preserve the mother's health. Because substantial evidence did support that finding, the Act is not facially invalid because it lacks a health exception.

C. Even Assuming That Partial-Birth Abortion Has Marginal Health Advantages In Some Cases, A Statute That Prohibits Partial-Birth Abortion Does Not Impose An Undue Burden On A Woman's Access To An Abortion

Even if the Court refused to defer to Congress's considered findings, respondents' trial evidence at most suggested that partial-birth abortion is *marginally* safer than other abortion procedures in some circumstances. Absent a showing that it would "create *significant* health risks," however, a statute prohibiting partial-birth abortion does not impose an undue burden on a woman's access to an abortion. *Stenberg*, 530 U.S. at 932 (emphasis added).

Casey's undue-burden standard effectively replaced the strict-scrutiny standard from *Roe*. See 505 U.S. at 876. In adopting the undue-burden standard, the joint opinion in *Casey* emphasized that the government has a "profound interest in potential life," *id.* at 878, and reasoned that "[t]he very notion that the [government] has a substantial interest in potential life leads to the conclusion that not all [abortion] regulations must be deemed unwarranted," *id.* at 876. Where the regulation at issue limits a specific method of abortion, the difference in safety must be significant enough that elimination of that method places a "substantial obstacle in the path of a woman seeking an abortion," in light of the continuing availability of other methods. *Id.* at 878. A different rule would force courts to make difficult medical judgment calls and would devalue the vital government interests that *Casey* sought to bring back into the equation in reviewing abortion regulations.

The protection of innocent human life—in or out of the womb—is the most compelling interest the government can advance. The Act implicates not only the government's compelling interest in protecting human life, but also the government's specific (and no less compelling) interest in prohibiting a particular type of abortion procedure that closely resembles infanticide. See, *e.g.*, *Stenberg*, 530 U.S. at 960, 962 (Kennedy, J., dissenting) (noting that, "[i]n light of the description of the D&X procedure, it should go without saying that Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue" and adding that "Nebraska was entitled to find the existence of a consequential moral difference between the [D&X and D&E] procedures"); *id.* at 1006 (Thomas, J., dissenting) (stating that "[t]here is no question that the State of Nebraska has a valid interest—one not designed to strike at the right itself—in prohibiting partial birth abortion" and adding that "States may, without a doubt, express [their] pro-

found respect [for the life of the unborn] by prohibiting a procedure that approaches infanticide").

In passing the Act, Congress specifically found that partial-birth abortion "blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth," Act § 2(14)(O), 117 Stat. 1206; that partial-birth abortion "also confuses the medical, legal, and ethical duties of physicians to preserve and promote life," § 2(14)(J), 117 Stat. 1205; and that failing to prohibit the procedure would "promote[] a complete disregard for infant human life," § 2(14)(L), 117 Stat. 1206, and "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life," § 2(14)(N), 117 Stat. 1206. In light of the relative strength of the government's interest in prohibiting partial-birth abortion, and the relative weakness of a woman's interest in having access to a particular type of abortion procedure that has no health advantages (according to Congress), or at most marginal health advantages, when compared with other, unregulated types of procedures, the Act is constitutional under *Casey* because it does not impose an undue burden on a woman's access to an abortion.

Holding that the Act is valid only if it contains a health exception would substantially undermine the government's compelling interests in preventing partial-birth abortion. As proponents of the Act appreciated,[13] a health exception, no

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[13] See, *e.g.*, H.R. Rep. No. 58, 108th Cong., 1st Sess. 69 (2003) (statement of Rep. Chabot) (stating that "a health exception, no matter how narrowly drafted, gives the abortionist unfettered discretion in determining when a partial-birth abortion may be performed"); 149 Cong. Rec. H4940 (daily ed. June 4, 2003) (statement of Rep. Sensenbrenner) (contending that "[a]bortionists have demonstrated that they can and will justify any abortion on the grounds that it, in the judgment of the attending physician, is necessary to avert serious adverse health consequences to the woman"); 149 Cong. Rec.

matter how narrowly crafted, would potentially give a physician unfettered discretion in determining when a partial-birth abortion may be performed. Cf. *Stenberg*, 530 U.S. at 972 (Kennedy, J., dissenting). Congress could thus have reasonably determined that a ban on partial-birth abortion that includes a health exception would amount to no ban at all.

D. To The Extent That The Court Believes That *Stenberg* Compels A Different Result, It Should Be Overruled

For the reasons explained above, the Act is constitutional under the principles adopted by the joint opinion in *Casey* and applied by this Court in *Stenberg*, notwithstanding the absence of a health exception. Although this Court reached a contrary result in *Stenberg* with respect to the state statute at issue there, *Stenberg* is distinguishable in a number of important respects from this case. Most notably, the statute at issue here is an Act of Congress accompanied by congressional findings—including the ultimate finding that partial-birth abortion is never medically indicated—that are amply supported by substantial evidence and therefore entitled to deference. In addition, the statute at issue carefully defines partial-birth abortion so that it does not reach the more common D&E procedure. See pp. 45-48, *infra*. Moreover, the trial record supporting the constitutionality of the Act is much more extensive than in *Stenberg*, where the trial lasted only one day (whereas the trial in this case lasted two weeks).

If this Court nevertheless concludes for any reason that its decision in *Stenberg* compels the conclusion that the Act is unconstitutional, however, *Stenberg* should be overruled. To

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S3607 (daily ed. Mar. 12, 2003) (statement of Sen. Santorum) (asserting that, "[i]n practice, of course, health means anything, so there is no restriction at all"); 143 Cong. Rec. 8355 (1997) (statement of Sen. Hutchinson) (noting that health exception "would allow any abortionist to kill a baby even after viability merely by signing a permission slip to himself, a so-called certification").

be sure, values of stare decisis help ensure continuity in the law as developed by this Court. However, to the extent that the Court construes *Stenberg* to require invalidation of the statute at issue, continuing adherence to *Stenberg* could not further those values, because such a reading of *Stenberg* would be unfaithful to the Court's prior precedents, including *Casey*, see *Stenberg*, 530 U.S. at 957, 960-963, 979 (Kennedy, J., joined by Rehnquist, C.J., dissenting); *id.* at 1005-1020 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting); *National Abortion Federation* v. *Gonzales*, 437 F.3d at 292 (Walker, C.J., concurring); it would risk "caus[ing] * * * society as a whole to become insensitive, even disdainful, to life, including life in the human fetus," *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting); and it would therefore only further unsettle this Court's abortion jurisprudence. Moreover, to the extent that *Stenberg* is read to require courts to disregard legislative findings and make fine-tuned judgments about the relative merits of particular medical techniques, it would place judges in an untenable position and would prove unworkable in practice. Indeed, the different analytical approaches reflected in the various lower-court opinions on the constitutionality of the Act demonstrate that *Stenberg* has created confusion and proven unworkable already.

II. THE ACT IS NEITHER UNCONSTITUTIONALLY OVERBROAD NOR UNCONSTITUTIONALLY VAGUE

Before the lower courts, respondents also contended that the Act was facially invalid because (1) it reached not only D&X abortions, but also certain standard D&E abortions, and thus was unconstitutionally overbroad, and (2) it was unconstitutionally vague. The district court agreed with the first contention, Pet. App. 507a-521a, but ultimately disagreed with the second, *id.* at 522a-529a. Although the court of appeals did not address either contention in light of its ruling on the

lack of a health exception, it would be appropriate for respondents to invoke their alternative arguments against the statute and in support of the judgment, and appropriate for this Court to consider them. See Supp. Br. in Support of Pet. for Cert. 8-9 & n.2. Each of those contentions lacks merit.

A. The Act Is Not Unconstitutionally Overbroad

1. In *Stenberg*, this Court held that the Nebraska statute at issue was invalid not only because it lacked a health exception, but also because it defined "partial birth abortion" in such a way as to reach standard D&E abortions as well as D&X abortions, and thereby imposed an undue burden on a woman's access to an abortion. 530 U.S. at 938-946. That statute barred a physician from "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999). The Court noted that a standard D&E abortion "will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S. at 939. The Court thus reasoned that, "[e]ven if the statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures." *Ibid.* The Court explained that the Nebraska statute did "not track the medical differences between D&E and D&X," nor did it "anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus." *Ibid.* "The plain language" of the statute, the Court concluded, "covers both procedures." *Ibid.*

2. The Act contains a definition of "partial-birth abortion" that differs in two critical respects from the statutory

definition at issue in *Stenberg*. First, the Act applies only where the person performing the abortion "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). By specifying so-called anatomical "landmarks," the Act excludes standard D&E abortions in which a smaller portion of the fetus, such as a foot or arm, is drawn through the cervix (or outside the mother's body altogether), and torn from the fetus, while the fetus is still living. Second, the Act applies only where the person performing the abortion also "performs [an] overt act, other than completion of delivery, that kills the partially delivered living fetus," and delivers the fetus with the purpose of performing that overt act. *Ibid.* By requiring a discrete "overt act," the Act excludes standard D&E abortions in which the delivery of a portion of the fetus and the performance of the lethal act (*i.e.*, the dismemberment of the fetus) are indistinguishable.

Not only is the Act's definition more precise than the definition at issue in *Stenberg*, but the fact that this case involves a *federal* statute gives the Court a much greater capacity to interpret the statute to avoid any constitutional difficulties than in a case, like *Stenberg*, involving a state statute. See, *e.g.*, *City of Houston* v. *Hill*, 482 U.S. 451, 474 (1987); *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369-370 (1971); cf. *Stenberg*, 530 U.S. at 944-945. The Act's textual definition clearly reflects the intent to reach D&X abortions, but not standard D&E abortions. If there is any doubt on that score, however, the Court can interpret the statute to avoid any constitutional concerns. This is not a context in which the Court should hold Congress to impossible standards of draftsmanship.

3. The district court held that the Act still reached certain D&E abortions: namely, abortions in which a physician delivers the required portion of the fetus, but only then performs a discrete act that kills the fetus ("either by dividing it into two or more pieces * * * or by reducing the skull and removing the fetus intact"). Pet. App. 517a-518a. Where, however, a physician delivers a major portion of the fetus—*i.e.*, the entire fetal head (in the case of a head-first delivery) or any part of the trunk past the navel (in the case of a feet-first delivery)—and then performs a discrete act that aborts the fetus, the procedure constitutes a "partial-birth abortion," in the literal sense of the phrase, rather than a standard D&E abortion, regardless whether the ultimate lethal act is (1) the dismemberment of the fetus, (2) the puncturing of its skull and vacuuming out of its brain, or (3) some other act (besides completion of delivery). Moreover, the Act would apply only where the physician had the specific intent to deliver the requisite portion of the fetus for the purpose of performing the ultimate lethal act *at the outset of the procedure*. See Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). The Act would therefore not cover situations in which a physician intended only to perform a standard D&E abortion, but ultimately had to perform a partial-birth abortion (for example, if the physician unintentionally delivered a major portion of the fetus, or if the physician attempted to deliver the living but non-viable fetus intact but was unable to do so because the head became stuck).[11] Be-

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[11] In holding that the Act was overbroad, the Ninth Circuit emphasized the fact that the Act does not contain an express exception for D&E abortions. *Planned Parenthood Federation*, 435 F.3d at 1176-1177. In *Stenberg*, however, the Court made clear that including such an exception was only an "example" of how a legislature could draw a permissible statute regulating partial-birth abortion, and suggested that the critical inquiry was instead whether the statute "track[ed] the medical differences" between partial-birth abortion and

cause the Act reaches no standard D&E abortions, the district court erred by holding that it was overbroad.[15]

B. The Act Is Not Unconstitutionally Vague

1. In order to survive a vagueness challenge, a statute "must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid.* Moreover, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks omitted).

2. The Act readily satisfies the relatively modest requirements of the void-for-vagueness doctrine. The Act prohibits only a particular type of abortion in which the physician "deliberately and intentionally vaginally delivers a living fetus" up to a specific anatomical point "outside the body of the mother"; does so "for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and then "performs the overt act, other than completion of delivery, that kills the partially delivered living fetus." Act § 3, 117 Stat. 1206-1207 (18 U.S.C. 1531(b)(1) (Supp. III 2003)). In addition, the physician must "knowingly" perform

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other, constitutionally protected types of abortion. 530 U.S. at 939.

[15] Moreover, even if the Act were unconstitutional only in some small number of its applications, the Act would not be facially invalid. See pp. 18-20, *supra*.

that type of abortion. § 3, 117 Stat. 1206 (18 U.S.C. 1531(a) (Supp. III 2003)). It is hard to imagine how the proscribed conduct could be defined any more precisely, at least without dramatically narrowing the scope of the statute.

3. Before the district court, respondents contended that various terms and phrases in the Act were unconstitutionally vague. See Pet. App. 528a. Those contentions, however, lack merit. Although the Act prohibits "partial-birth abortion," any alleged vagueness in that phrase is irrelevant, because the Act proceeds to define the phrase with particularity. And none of the terms or phrases used *within* that definition is ambiguous. As the district court noted, the phrase "overt act" is a "standard statutory term[] of art," *id.* at 529a, which appears in numerous other criminal statutes. See, *e.g.*, 18 U.S.C. 1117, 1201(c), 2101(a). And "overt act" is immediately qualified by the phrase "other than the completion of delivery," which serves to limit its scope. In addition, as the district court also noted, the term "living" in the phrase "living fetus" is a "commonplace word" of which "doctors have a practical understanding." Pet. App. 529a. "Living" refers to a fetus that is either *potentially* or actually viable: *i.e.*, a fetus that "has a detectable heartbeat or pulsating umbilical cord." *Planned Parenthood Federation*, 435 F.3d at 1184. In short, because the Act contains no ambiguous terms and phrases, and because the Act as a whole plainly provides sufficient notice of the conduct that it prohibits, the district court correctly held that the Act is not unconstitutionally vague.

III. BECAUSE THE ACT IS CONSTITUTIONAL, THE COURT NEED NOT FASHION ANY REMEDY

As explained above, the Act materially differs from the state statute at issue in *Stenberg* and is constitutional under a proper analysis. In the event, however, that this Court were to identify some aspect in which the Act is invalid, it may be

possible to craft narrower injunctive relief along the lines suggested in *Ayotte* v. *Planned Parenthood of Northern New England*, *supra*. Because the availability of narrower injunctive relief turns both on the nature of the statute's infirmity and on a statute-specific inquiry into legislative intent, the Court may wish to remand so that the lower courts can address that issue in the first instance. In any event, because the statute is, in fact, constitutional, further development of the remedial question implicated in *Ayotte* will need to wait for a different case. Here, Congress has identified a single, rarely used abortion procedure that it found to be medically unnecessary. Upholding that statute merely requires the Court to reaffirm the government's critical interests in regulating abortion procedures to protect life and prohibit procedures that blur the line between abortion and infanticide.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

UNITED STATES PUBLIC LAWS
108th Congress - First Session
Convening January 7, 2003

PL 108-105 (S 3)
Nov. 5, 2003

PARTIAL-BIRTH ABORTION BAN ACT OF 2003

An Act To prohibit the procedure commonly known as partial-birth abortion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "Partial-Birth Abortion Ban Act of 2003".

SEC. 2. FINDINGS.

The Congress finds and declares the following:

(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child's body until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act (usually the puncturing of the back of the child's skull and removing the baby's brains) that the person knows will kill the partially delivered infant, performs this act, and then completes delivery of the dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. As a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

(3) In Stenberg v. Carhart, 530 U.S. 914, 932 (2000), the United States Supreme Court opined "that significant medical authority supports the proposition that in some circumstances, [partial birth abortion] would be the safest procedure" for pregnant women who wish to undergo an abortion. Thus, the Court struck down the State of Nebraska's ban on partial-birth abortion procedures, concluding that it placed an "undue burden" on women seeking abortions because it failed to include an exception for partial-birth abortions deemed necessary to preserve the "health" of the mother.

(4) In reaching this conclusion, the Court deferred to the Federal district court's factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(5) However, substantial evidence presented at the Stenberg trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health

risks to a woman upon whom the procedure is performed and is outside the standard of medical care.

(6) Despite the dearth of evidence in the Stenberg trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not "clearly erroneous". A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985). Under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently". Id. at 574.

(7) Thus, in Stenberg, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 State legislatures.

(8) However, under well-settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in Stenberg under the "clearly erroneous" standard. Rather, the United States Congress is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the

Constitution, and draws reasonable inferences based upon substantial evidence.

(9) In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining nondiscriminatory treatment in public services," the Court stated that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case.". Id. at 653.

(10) Katzenbach's highly deferential review of Congress' factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the "bail-out" provisions of the Voting Rights Act of 1965 (42 U.S.C. 1973c), stating that "congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose". City of Rome, Georgia v. U.S., 472 F. Supp. 221 (D.D.C. 1979) aff'd City of Rome, Georgia v. U.S., 446 U.S. 156 (1980).

(11) The Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994) (Turner I)

and Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180 (1997) (Turner II). At issue in the Turner cases was Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be "seriously jeopardized". The Turner I Court recognized that as an institution, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here", 512 U.S. at 665-66. Although the Court recognized that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,'" its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.". Id. at 666.

(12) Three years later in Turner II, the Court upheld the "must-carry" provisions based upon Congress' findings, stating the Court's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" 520 U.S. at 195. Citing its ruling in Turner I, the Court reiterated that "[w]e owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon' legislative questions," id. at 195, and added that it "owe[d] Congress" findings an additional measure of deference out of respect for its authority to exercise the legislative power.". Id. at 196.

(13) There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-

birth abortion is not required to contain a "health" exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care, and should, therefore, be banned.

(14) Pursuant to the testimony received during extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, Congress finds and declares that:

(A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: An increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, "there are very few, if any, indications for * * * other than for delivery of a second twin"; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

(C) A prominent medical association has concluded that partial-birth abortion is "not an accepted medical practice", that it has "never been subject to even a minimal amount of the normal medical practice development," that "the relative advantages and disadvantages of the procedure in specific circumstances remain unknown," and that "there is no consensus among obstetricians about its use". The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is "ethically wrong," and "is never the only appropriate procedure".

(D) Neither the plaintiff in Stenberg v. Carhart, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) Based upon Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in Roe when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person". Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortions are "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb". According to this medical association, the "partial birth" gives the fetus an autonomy

which separates it from the right of the woman to choose treatments for her own body".

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated

with piercing his or her skull and sucking out his or her brain.

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

SEC. 3. PROHIBITION ON PARTIAL-BIRTH ABORTIONS.

(a)IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 73 the following:

"CHAPTER 74—PARTIAL-BIRTH ABORTIONS

"Sec.

"1531. Partial-birth abortions prohibited.

"§ 1531. Partial-birth abortions prohibited

"(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is

endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

"(b) As used in this section—

"(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

"(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

"(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

"(2) Such relief shall include—

"(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

"(B) statutory damages equal to three times the cost of the partial-birth abortion.

"(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 73 the following new item:

"74. Partial-birth abortions.....1531".

Approved November 5, 2003.